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CHARLES ELMORE C
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IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1929.

No. 460

CITY OF NEW ORLEANS,

versus

NEW ORLEANS PUBLIC SERVICE INC.,
Appellant.

On Appeal from the Supreme Court of the State of Louisiana.

STATEMENT AS TO JURISDICTION ON APPEAL.

CHARLES ROSEN,
ALFRED C. KAMMER,
Counsel for Appellant.

MONTGOMERY-ANDREE PRINTING CO. INC., 420-432 CHARTRES, N.O.

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May It Please the Court:

The appellant in support of the jurisdiction of this Court to review the above entitled cause on appeal respectfully represents:

A.

STATUTORY PROVISION SUSTAINING JURISDICTION.

The Act of February 13, 1925, Chapter 229, Section 1, 43 Stat., 936 (United States Code, Title 28, Section 344),

provides that Section 237 of the Judicial Code is amended to read in part as follows:

> "Sec. 237. (a) A final judgment or decree in any suit in the highest court of a State in which a decision in the suit could be had, where is drawn in question the validity of a treaty or statute of the United States, and the decision is against its validity; or where is drawn in question the validity of a statute of any State, on the ground of its being repugnant to the Constitution, treaties, or laws of the United States, and the decision is in favor of its validity, may be reviewed by the Supreme Court upon a writ of error. The writ shall have the same effect as if the judgment or decree had been rendered or passed in a court of the United States. The Supreme Court may reverse, modify, or affirm the judgment or decree of such State court, and may, in its discretion, award execution or remand the cause to the court from which it was removed by the writ.
>
> "(b) It shall be competent for the Supreme Court by *certiorari*, to require that there be certified to it for review and determination, with the same power and authority and with like effect as if brought up by writ of error, any cause wherein a final judgment or decree has been rendered or passed by the highest court of a State in which a decision could be had where is drawn in question the validity of a treaty or statute of the United States; or where is drawn in question the validity of a statute of any State on the ground of its being repugnant to the Constitution, treaties, or laws of the United States; or where any title, right, privilege, or immunity is specially set up or claimed by either party under the Constitution, or any treaty or statute of, or commission held or authority exercised under, the United States; and the power to review under this paragraph may be exercised as well where the

Federal claim is sustained as where it is denied. Nothing in this paragraph shall be construed to limit or detract from the right to a review on a writ of error in a case where such a right is conferred by the preceding paragraph; nor shall the fact that a review on a writ of error might be obtained under the preceding paragraph be an obstacle to granting a review on certiorari under this paragraph.

"(c) If a writ of error be improvidently sought and allowed under this section in a case where the proper mode of invoking a review is by a petition for *certiorari*, this alone shall not be a ground for dismissal; but the papers whereon the writ of error was allowed shall be regarded and acted on as a petition for *certiorari* and as if duly presented to the Supreme Court at the time they were presented to the court or judge by whom the writ of error was allowed: Provided, That where in such a case there appears to be no reasonable ground for granting a petition for *certiorari* it shall be competent for the Supreme Court to adjudge to the respondent reasonable damages for his delay, and single or double cost, as provided in section 1010 of the Revised Statutes."

By Act of Congress of January 31, 1928, Chapter 14, 45 Stat., 54, it is provided:

"That the writ of error in cases, civil and criminal, is abolished. All relief which heretofore could be obtained by writ of error shall hereafter be obtained by appeal."

And by Act of April 26, 1928, Chapter 440, 45 Stat., 466, amending Section 2, of the Act January 31, 1928, it is provided:

"Sec. 2. The statutes regulating the right to a writ of error, defining the relief which may be

had thereon, and prescribing the mode of exercising that right and of invoking such relief, including the provisions relating to costs, supersedeas and mandate, shall be applicable to the appeal which the preceding section substitutes for a writ of error."

B.

DATE OF DECREE AND DATE OF APPLICATION FOR APPEAL.

The decree sought to be reviewed was entered on the 20th day of May, 1929 (R. p. 220). Rehearing denied June 17, 1929 (R. p. 227).*

The application for appeal was presented on the 27th day of August, 1929 (R. p. 228). The order allowing appeal was granted August 27, 1929 (R. p. 230), and the order extending the time to file the transcript was allowed September 23, 1929, extending the time for thirty days from September 26, 1929. (R. p. 233).

C.

NATURE OF CASE AND RULING BELOW.

(a) **Nature of the Case.** On July 27, 1909, the Council of the City of New Orleans adopted Ordinance No. 6032, New Council Series, directing the Comptroller of the City to advertise for sale and to sell at public auction a franchise, right of way and right to construct, maintain

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*All references to the record are to the pages of the certified unprinted record prepared by the Clerk of the Supreme Court of Louisiana and on file with the Clerk of this Court. The record has not yet been printed.

and operate a line of street railway, i. e., a double track street railway beginning on Lafayette Avenue at the corner of Villere Street, and extending on Lafayette Avenue to the intersection of Franklin Avenue, thence along Franklin Avenue to the intersection of St. James Avenue (see copy of Ordinance, 12 of defendant's exhibits).

On December 17, 1909, by act before Robert Legier, Notary Public (13 of defendant's exhibits), the City of New Orleans, pursuant to public adjudication by the aforesaid Comptroller and pursuant to the provisions of said Ordinance No. 6032, N. C. S., granted to New Orleans Railway & Light Company a franchise for a street railway from Lafayette Avenue and Villere Street to Franklin Avenue and St. James Avenue, in accordance with the provisions of the aforesaid ordinance, which is copied *in extenso* in said notarial act, and which contains paragraph (x) of Section 2 of said ordinance, which reads as follows:

> "The purchaser is obligated herein to construct and operate the railway provided for herein within twelve (12) months after the signing of the contract provided for, and to this end, at least one track with the necessary curves, switches, etc., shall be completed at that time, but the construction of the remainder need not be completed until such time as the purchaser may deem necessary."

Before said line of street railway was constructed on Franklin Avenue, the New Orleans Terminal Company objected to the New Orleans Railway & Light Company crossing its railroad tracks at grade on Franklin Avenue at the intersection of Florida Walk.

The City of New Orleans, being of opinion that the general public interest would be best subserved by the tracks of the New Orleans Railway & Light Company not crossing at grade, but that the said tracks should cross the tracks of the railroad company on a viaduct, and the Railway Company, being satisfied to build such a viaduct, the Council of the City of New Orleans, on March 8, 1910, adopted Ordinance No. 6445, N. C. S. (18 of defendant's exhibits), which directed and required the Railway Company to construct, subject to the approval of the City Engineer, a viaduct

> "approximately on the center line of Franklin Avenue at and in the vicinity of the Florida Walk intersection, the said viaduct to embrace earthen embankment approaches of such height and width as will not exceed the neutral ground space on Franklin Avenue nor obstruct the roadways on said Avenue."

The viaduct was constructed in 1910 and thereafter, in February of 1914, W. J. Hardee, then City Engineer, and Hon. E. E. Lafaye, then Commissioner of Public Property, approved a plan of the Railway Company for the earthen embankment or fill on said viaduct and said earthen embankment or fill was constructed. (See Plan, 1 of defendant's exhibits). The viaduct, since its erection in 1910, has been and still is in operation.

Thereafter, New Orleans Public Service Inc., appellant herein, acquired the rights of the New Orleans Railway & Light Company in and to the franchise aforesaid by Special Master's deed dated September 27, 1922, in the matter of *New York Trust Company v. New Orleans Rail-*

way & Light Company, No. 16,953 in Equity, United States District Court for the Eastern District of Louisiana (see Admission, R. p. 199).

On November 16, 1926, the Commission Council of the City of New Orleans adopted Ordinance No. 9375, C. C. S. (R. pp. 8-a and 8-b), ordering appellant to forthwith remove the viaduct; to construct, operate and maintain a double line of tracks for the operation of its cars at street level along Franklin Avenue, and that the work of dismantling and removing said viaduct should be completed within one year after the passage of said ordinance.

Appellant refused to comply with said ordinance and the City of New Orleans instituted suit. (See Petition, R. p. 1). Defendant filed answer (R. p. 9) averring, among other things, that New Orleans Railway & Light Company, the grantee and predecessor in title to defendant of the franchise to operate said street railway line on Franklin Avenue, was, by Ordinance No. 6445, N. C. S., directed and required by the City Council in 1910, in the interest of public safety, to construct said viaduct; that the said viaduct was constructed at a cost of approximately $58,000.00; that it had ever since been maintained and operated with due regard of safety by the New Orleans Railway & Light Company and by defendant as its successor, and it has proved entirely adequate and sufficient for the transportation of the users of said line; that the viaduct was required to be built over the tracks of the Southern Railway Company (New Orleans Terminal Co.) because at that point said grade crossing was dangerous, by reason of the fact that there are eight steam railroad tracks almost continually used by said Southern Railway and

other companies for the switching and operation of trains and cars during the day and the night and that said viaduct was not required to be extended across the railroad tracks of the L. & N. Railroad, by reason of the fact that there was and is no such almost continuous switching operation of trains and cars there as was and is at said Southern Railway crossing; that the viaduct has at all times been kept in a safe condition, has not been allowed to deteriorate, has been operated with safety, and that it has been entirely adequate for the needs of the public of that vicinity, which is substantially the same as it was when the viaduct was built; that there is no need whatever now to require the destruction of said viaduct and to require defendant to cross eight tracks of the Southern Railway Company at grade crossing, which would not only be a needless expense involving a cost in excess of $135,000.00, besides the loss of the money already expended by defendant's predecessor, as aforesaid, but would subject the defendant and the users of said street railway line to the very hazards and dangers of grade crossing accidents which the viaduct was intended to and does eliminate; that there is now and was no justification for the passage of Ordinance 9375, C. C. S., requiring the demolition of the viaduct, and that defendant should rebuild its tracks across the Southern Railway Company tracks at grade and that the passage of said ordinance was unjust, arbitrary and oppressive; that it was not a legitimate exercise of the police power of the City and not required by any consideration of safety to the public; on the contrary, the demolition of the viaduct and the requiring of defendant to cross said Southern Railway Company tracks at grade would introduce the grave hazards and dangers which the viaduct has all these years eliminated;

that Ordinance 9375, C. C. S., was passed not in the interest of public safety, but in order to satisfy certain property owners who consider that their property is being damaged by the presence of said viaduct, and for no other adequate reason; that defendant's predecessor was required by the City to build said viaduct originally at a heavy cost in order to obviate the dangers of a grade crossing, and now to require defendant to demolish the viaduct which the City itself ordered should be built and to establish the grade crossing aforesaid is not a legitimate and proper exercise of the police power of the City, but an arbitrary exercise of its power and utterly illegal and a deprivation of defendant's property without due process of law, in violation of the Fourteenth Amendment of the Constitution of the United States and an impairment of the obligation of its contract rights with the City, in violation of Section 10 of Article 1 of the Constitution of the United States.

On the trial of the case, without any written reasons, the District Court rendered judgment (R. p. 15) in favor of the City, in accordance with the prayer of the petition. On appeal therefrom, this judgment was affirmed by the highest court of the State of Louisiana, the Louisiana Supreme Court, in which a decision of the suit could be had (Louisiana Constitution of 1921, Art. VII, Sec. 10) (R. p. 220); from which this appeal is taken (R. p. 228).

The pertinent grounds of attack levelled against Ordinance No. 9375, Commission Council Series, of the City of New Orleans are:

(a) That the provisions of said ordinance, requiring the defendant to demolish the viaduct

which the City of New Orleans ordered should be built, and requiring defendant to establish a grade crossing, was not a legitimate and proper exercise of the police power and was violative of the Fourteenth Amendment, Section 1, of the Constitution of the United States, as depriving defendant of its property without due process of law.

(b) That said ordinance requiring the demolition and removal of the viaduct was an impairment of the obligations of defendant's contract rights with the City of New Orleans and was violative of Section 10 of Article 1 of the Constitution of the United States (R. pp. 12, 13 and 14).

These grounds of attack are set up at each and every step and more specifically (1) in the original answer (R. pp. 9-14); (2) on application for rehearing (R. p. 226), and (3) in assignment of errors filed on allowance of this appeal (R. pp. 228-229).

(b) **Ruling Below.** The opinion (R. pp. 220-225) concedes that the Federal constitutional question was before the Louisiana Supreme Court (R. pp. 220-225); that its determination was essential to the decision upholding the validity of Ordinance No. 9375, C. C. S., and the Court proceeded to determine and did determine that question adversely to appellant. (R. p. 225).

The case of *Chicago & Alton Ry. Co. v. Tranbarger, 238 U. S. 67 (59 L. Ed. 1205)*, is cited by the Louisiana Supreme Court as authority for its ruling (R. p. 225).

Since the ruling is not supported by the case cited, nor foreclosed by any prior decisions of this Court, nor by the facts, there is here a substantial Federal constitutional question requiring review by appeal as of right.

(c) **Cases Believed to Sustain Jurisdiction.** The following decisions of this Court are believed to sustain jurisdiction of this appeal:

King Mfg. Co. v. Augusta, 277 U. S., 100.
Sultan Ry. Co. v. Dept. of Labor, 277 U. S., 135.
Whitney v. California, 274 U. S., 357, 362.
Fiske v. Kansas, 274 U. S., 380, 385, 386.
Bluefield Co. v. Pub. Ser. Comm., 262 U. S., 679, 683.
Zucht v. King, 260 U. S., 174, 176.
La. Ry. & Nav. Co. v. New Orleans, 235 U. S., 164.
Reinman v. Little Rock, 237 U. S., 171, 176.
North Carolina R. Co. v. Zachary, 232 U. S., 248, 257.
Atlantic Coast Line v. Goldsboro, 232 U. S., 548.
Owensboro v. Cumberland Telephone Co., 230 U. S., 58.
Grand Trunk Western Ry. v. South Bend, 227 U. S., 544.
Illinois Central Railroad v. Chicago, 176 U. S., 646.

We submit that this Court has jurisdiction of this appeal by virtue of Section 237 of the Judicial Code, as amended by the Act of February 13, 1925.

Respectfully submitted,

CHARLES ROSEN,
ALFRED C. KAMMER,
Counsel for Appellant.